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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 615

STEWART DIE CASTING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court below (R. 1688–1705) is reported in 114 F. (2d) 849. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1611–1663) are reported in 14 N. L. R. B. 872.

JURISDICTION

The decree of the Court below (R. 1712–1719) was entered on October 29, 1940. The petition for

a writ of certiorari was filed on December 10, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. A question urged by petitioner, but which we think is not properly presented, is whether in the circumstances of this case the Board exceeded its power in ordering the reinstatement of employees who participated in a brief sit-down strike, where the employees engaged in no violence or destruction of property, promptly and peaceably evacuated the plant when requested to do so by peace officers, and were never discharged by the employer, but, on the contrary, were repeatedly solicited to return to work.

2. Whether the charge is, in certain respects, adequate to support the Board's complaint and order.

3. Whether certain reinstatement provisions of the Board's order are invalid because the employees covered thereby were not listed by name in the complaint.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings [1] the Board issued its findings of fact, conclusions of law, and order (R. 1611–1663). The findings of the Board, which were sustained by the Court below and are not challenged by the petition for certiorari, may be summarized as follows: [2]

At 1 o'clock a. m. on March 16, 1937, as the result of dissatisfaction with working conditions (R. 1619; 157–158, 171–175), approximately 150 employees on the night shift at petitioner's Chicago plant engaged in a sit-down strike (R. 1619; 156–159, 161–165, 176–180, 187–190, 953–957, 1023–1025). The sit-down was of brief duration, being terminated at 3 a. m. on the following day, March 17, when the Chicago police entered and evicted the strikers (R. 1619; 156, 955). Petitioner's officials were not excluded from the plant during the sit-

[1] There were two proceedings before the Board, numbered respectively, C–577 and C–869, which were consolidated by the Board for all purposes (R. 1591). The present petition for certiorari involves only No. C–577. The proceedings in C–577 were as follows: Amended charges filed by United Automobile Workers of America, Local 298, herein called the U. A. W. or the Union (R. 37–40, 45), complaint and notice of hearing (R. 29–36), answer (R. 46–50), hearing before a trial examiner, Intermediate Report of the trial examiner (R. 1549–1562), exceptions thereto (R. 1563–1576); and oral arguments before the Board (R. 1615–1616).

[2] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence. Jurisdictional facts are omitted, since no question as to jurisdiction is raised.

down (R. 1619; 178, 1024, 1069, 1097); there was no violence and no damage was done to the company's property during its occupation by the strikers (R. 1619; 156, 190, 957, 1066–1067); and the employees left peaceably when requested to do so by the police (R. 1619; 957). On the morning of March 16, 1937, when the employees on the day shift came to work they found the plant closed down and were advised by representatives of petitioner that the plant would remain closed for a few days (R. 1619; 955, 1022). These employees at once formed a picket line (Cf. R. 1636; 80–81). During the course of the day the U. A. W., which had had nothing to do with the calling of the sit-down strike, undertook to enlist members among the employees (R. 1619–1620; 166, 80); by March 22, 574 employees, a large majority of the approximately 685 employees in an appropriate bargaining unit,[3] had joined the U. A. W. (R. 1618, 1619; Bd. Exh. 7, R. 83–92, 127, 134, 167). On March 22, at a conference held between representatives of the U. A. W. and officials of the Company, the Union spokesmen informed petitioner that the U. A. W. represented a majority of the employees and requested petitioner to recognize it as the employees'

[3] The Board found the appropriate collective bargaining unit to consist of the hourly and piece-rate production and maintenance employees, excluding supervisory and office employees, draftsmen, and watchmen (R. 1617). The propriety of the Board's determination as to the bargaining unit has not been questioned at any stage of the proceeding and is not challenged by the petition for certiorari.

collective bargaining representative (R. 1620; 97, 107, 114, 243). Hellings, petitioner's president, stated that he would take the matter under advisement, and the meeting adjourned (R. 1620; 98, 959). The following day Hellings, completely ignoring the U. A.W., sent a mimeographed letter to each employee in which, after referring to the Union's request for recognition, he stated:

> Today I am replying to the Committee as follows:
>
> * * * * *
>
> So far as the presentation of any complaint is concerned, it makes no difference to me now or in the past whether they are presented by individuals or groups of employees. They will all be treated with equal courtesy and attention.
>
> Do not be led astray by any claim that we can be bullied or coerced by any labor organization—or that we are willing to enter into a horse-trading contract with any group who claim the ability to deliver free workmen at a price.

(R. 1621–1622; Bd. Exh. 8A, R. 986). Other portions of the letter impunged the motives of the leaders of the Union, to whom it referred as "agitators," and intimated that continued affiliation with the U. A. W. would result in the loss of the employees' jobs (*ibid.*). The Board found that Hellings' letter of March 23 constituted a refusal to bargain collectively with the U. A. W. (R. 1628).

Further refusals to recognize and to bargain collectively with the U. A. W. occurred on April 9, April 17, June 21, and June 24, 1937 (R. 1623–1629; 1205–1206, 1213, 1239, 1165–1170, 238–240, 249, Bd. Exhs. 10, 11A, 11B, 365, 355–357). The Board found that petitioner's refusal to bargain collectively on March 23 and thereafter served to prolong the strike in which petitioner's employees were engaged (R. 1632).

On March 25, petitioner reopened its plant (R. 1636; 64). Company representatives made strenuous efforts to induce the striking employees to return to work, seeking them out in their homes and on the picket line and offering them—including the employees who had participated in the sit-down (Pet. 6–7)—2 weeks pay for the time they had been on strike and a 10-percent wage increase (R. 1633; 1098–1101, 1123, 1125, 972, 1029–1030). These offers were accompanied in many instances by attacks on the U. A. W. by company officials and statements that petitioner would not enter into an agreement with the U. A. W. (R. 1633–1634; 781–782, 824–825, 1099, 1122, 113, 332, 455, 481, 579, 581). As a result of these tactics, some 348 of the strikers were induced to return to work (R. 1634). In addition, petitioner hired approximately 230 new employees to take the places of those who remained on strike (R. 1636). All these new employees were hired after March 23, 1937, the date of the first refusal to bargain collectively (*ibid.*).

At a conference between the U. A. W. and petitioner, held on June 21 and continued on June 24, the U. A. W. again demanded recognition as the collective bargaining representative of the employees, and also requested that the new employees hired during the course of the strike be discharged and the strikers reinstated immediately (R. 1625; 355–357, 365, 1005, 1208). Petitioner rejected both proposals (R. 1625; 355–357, 365, 1005, 1208). It agreed, however, that it would reinstate the striking employees if and when any vacancies occurred and that reinstatement would be in accordance with a list to be submitted by the U. A. W. (R. 1625–1626; 357–359, 361, 1210). The U. A. W. then called off the strike (R. 1636; 318). On June 26 the petitioner again sent a letter directly to its individual employees in which it denounced the strike as having been "due to ill-advised group hysteria rather than to any real reason," and stated that "It is not necessary for employees to join a union and burden themselves with dues and assessments in order to confer with and receive fair treatment from the Company" (R. 1634–1635; Bd. Exh. 14, 271, 973).

The Board found that petitioner's refusal on June 24, 1937, and thereafter, following the request of the U. A. W., to reinstate 113 named employees who had participated in the strike was based on "the fact that they were members of the U. A. W. and had engaged in concerted activities," and that

such conduct constituted discrimination in regard to hire and tenure of employment and discouraged membership in the U. A. W. in violation of Sections 8 (3) and (1) of the Act (R. 1641). Forty-one other employees who participated in the strike and were likewise refused reinstatement on June 24, 1937, were subsequently reinstated on various dates between July and October 1937 but were thereafter discharged (R. 1643, 1661). The Board found that both the tardy reinstatement of these men and their subsequent dismissal was based on their membership in the U. A. W. and participation in the strike, and that by such discrimination in regard to hire and tenure of employment petitioner discouraged membership in the Union and violated Sections 8 (3) and (1) of the Act (R. 1643–1645).

Upon the basis of these findings the Board ordered petitioner to cease and desist from its illegal acts; to offer reinstatement to the employees discriminatorily denied reinstatement or discharged and to make them whole for any loss of pay suffer by reason of petitioner's discrimination; upon application, to reinstate all other employees who were on strike on March 23, 1937, and thereafter, with back pay from the date of any refusal of their application for reinstatement pursuant to the order; to restore to the employees who were on strike on March 23, 1937, and who have already been reinstated, their seniority and other rights and privileges; upon request, to bargain collectively with the Union; and to post appropriate notices (R. 1655–1663).

On November 6, 1939, petitioner filed in the court below a petition to set aside the Board's order (R. 2–19). The Board requested enforcement of its order (R. 20–29). On July 3, 1940, the court enforced the Board's order, with certain modifications not here material (R. 1688–1705). Thereafter, a petition for rehearing filed by the company was denied (R. 1711).

ARGUMENT

1. Petitioner contends that the Board exceeded its powers under Section 10 (c) in ordering the reinstatement of the employees who engaged in the sit-down strike. This contention was not urged before the Board by petitioner (see R. 1638), and Section 10 (e) of the Act provides that no objection not urged before the Board shall be considered by the court, unless the failure to urge the objection "shall be excused because of extraordinary circumstances." There is no showing here of any such "extraordinary circumstances." Consequently the contention may not be considered by this Court. Furthermore, the record is silent, and the Board made no finding, as to the identity of the sit-down strikers; doubtless, this was in consequence of petitioner's failure to urge its present contention before the Board. And as the court below pointed out, "petitioner's rights in this respect, if any, would constitute matters of defense to the Board's charge and * * * the burden was upon the petitioner to offer proof in support thereof" (R. 1698).

In any event, the contention that the Board was without power to order the reinstatement of the sit-down strikers under the circumstances of the present case is without merit. The situation here is wholly unlike that presented in *National Labor Relations Board* v. *Fansteel Metallurgical Corporation,* 306 U. S. 240, on which petitioner relies. The *Fansteel* decision went on two grounds: (1) that the employer in that case had exercised its right to discharge employees for illegal conduct engaged in during the strike; (2) that the conduct in which the sit-down strikers and those who aided and abetted them engaged was of so aggravated a character as to make the Board's order of reinstatement an abuse of the Board's discretion. In the latter connection, the opinion of this Court recites that the *Fansteel* strikers remained in occupation of the Company's plant for 9 consecutive days; that they defied a court injunction requiring them to vacate the premises and engaged in two pitched battles with peace officers seeking to enforce the injunction; and that most of the men were eventually fined and given jail sentences for violating the injunction (306 U. S. at 248–249). In addition, *Fansteel's* plant and machinery were damaged during the course of the strike (5 N. L. R. B. 930, 942–943; cf. 306 U. S. at 253).

In the present case, the Board's unchallenged finding is that the sit-down strikers were not discharged. The first ground of decision in the *Fansteel* case is therefore inapplicable. Nor does the

second ground apply. As noted above, petitioner here does not challenge but, indeed, expressly concedes the correctness of the Board's findings as to the facts (Pet. Br. p. 2). These findings, summarized *supra,* pp. 3–4, establish that the entire sit-down episode lasted only 26 hours; that petitioner's officials were not ousted from the plant but had free access thereto at all times; that no damage was done to petitioner's property; that there was no defiance of law officers or violation of any injunction; that the strikers evacuated the plant promptly and peaceably when requested to do so by the police, and that the employees involved were never discharged by petitioner but, on the contrary, were repeatedly asked to return to work and offered substantial inducements to do so.

Nor is there any conflict, as petitioner asserts, with *McNeely & Price Co.* v. *National Labor Relations Board,* 106 F. (2d) 878 (C. C. A. 3d). While there was not, in that case, any explicit discharge of the strikers, as there was in *Fansteel,* neither was there any such degree of affirmative condonation as here. Also, it appears that in the *McNeely & Price* case certain goods were spoiled by neglect during the strikers' occupation of the premises (106 F. (2d) at 880–881), in contrast with the absence of damage to the employer's property here. These differences serve not only to distinguish the case but to show the extent to which each case turns on its facts. Further, the wave of sit-down strikes which swept over the country in

1937 has long since receded, leaving little general importance to the question in what circumstances the Board may order the reinstatement of sit-down strikers.

2. There is no merit in the contention (Pet. 11, Br. 5–8) that there is a fatal variance between the charge and the complaint with respect to the 41 employees found by the Board to have been discharged in violation of the Act following their temporary reinstatement by petitioner. The amended charge (R. 37) alleged that petitioner, in violation of Section 8 (3) of the Act, had "discriminated in regard to hire and tenure of employment and terms and conditions of employment to discourage membership in Local 298 * * *." The employees alleged to have suffered such discrimination were listed in an appendix to the amended charge or in an amendment thereto (R. 38–40, 45); among them were all of the 41 employees in question with the exception of William Fisher, who, petitioner admits (Br. 6), was not discharged until after the filing both of the charge and the complaint. The complaint, for the most part, set forth the allegations of the charge in *haec verba*, but it went into greater detail as to the violation of Section 8 (3) with respect to the 41 employees, by alleging that after these persons had been reinstated, they were further discriminated against by being discharged on account of their union membership and activity. Clearly, there is here no such drastic departure from the charge as petitioner asserts. The com-

plaint set forth no new unfair labor practice; it merely "elaborated the charge with particularity." *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 368; see *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. (2d) 38 (C. C. A. 6th).

3. The Board, having found that the strike was prolonged after March 23, 1937, by petitioner's unfair labor practices, issued its usual order in such cases, requiring the company, upon application, to offer reinstatement to the striking employees, or in the event that no jobs were immediately available, to place such employees upon a preferential list, with back pay from 5 days after the date of application to the date of the offer of reinstatement or placement upon a preferential list. Petitioner does not challenge the appropriateness of this form of remedial order (Pet. 11), but asserts that it was deprived of a "substantial right" by the failure of the Board's complaint to list the individuals as to whom this relief was ordered. Approximately this contention was rejected in *Republic Steel Corp.* v. *National Labor Relations Board,* 107 F. (2d) 472 (C. C. A. 3d). The court said (p. 478):

> Republic further contends that the order for the reinstatement of the strikers was invalid because the complaint did not tender the issue of the reinstatement of the strikers. The complaint did, however, enumerate certain unfair labor practices and allege that because of these practices and of the

> refusal to sign the contract the strike took place. Section 10 (c) of the Act specifically authorizes the Board to direct reinstatement of employees if unfair labor practices are found. Republic was, therefore, sufficiently informed that such action might be required by the Board.

The contention was renewed in the petition for certiorari in precisely the same terms in which it is now urged (Pet. pp. 53–54, No. 707, Oct. Term, 1939), but certiorari was denied (309 U. S. 684; certiorari granted limited to another point, 310 U. S. 655). Numerous other cases in which enforcement has been granted to orders requiring the reinstatement of striking employees, where the strikes were caused or prolonged by unfair labor practices, on the basis of complaints identical in form with the complaint here, are listed in the footnote.[4] There are no contrary decisions.

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[4] *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576; *Black Diamond Steamship Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, 304 U. S. 579; *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 68 (C. C. A. 2d), affirmed, 309 U. S. 629; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3d), certiorari denied, 308 U. S. 605; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254 (C. C. A. 3d), certiorari denied, 308 U. S. 615; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6th), certiorari denied, 308 U. S. 568; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179

CONCLUSION

The decision below is clearly correct and presents neither a conflict of decisions nor any question of substantial public importance. The petition should therefore be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

THOMAS E. HARRIS,
Special Assistant to the Attorney General.

ROBERT B. WATTS,
General Counsel,

LAURENCE A. KNAPP,
Associate General Counsel,

MORTIMER B. WOLF,
BERTRAM EDISES,
Attorneys,
National Labor Relations Board.

DECEMBER 1940.

(C. C. A. 6th); *National Labor Relations Board* v. *Boss Mfg. Co.*, 107 F. (2d) 574, 579 (C. C. A. 7th); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432 (C. C. A. 7th); *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8th); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9th); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9th).